

**BOARD FOR PROFESSIONAL
ENGINEERS**

V.

**M. LEE SUTHERLAND,
RESPONDENT**

*** BEFORE NICOLE PASTORE KLEIN,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE OF
* ADMINISTRATIVE HEARINGS
* CASE NOS.: 07-PE-16 and 07-PE-19
* OAH NO.: DLR-ENP-59-06-32198**

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RECOMMENDED DECISION

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STATEMENT OF THE CASE

On August 12, 2010, the Board for Professional Engineers (Board) issued charges against M. Lee Sutherland (Respondent) alleging that he misrepresented that he was authorized to practice engineering in Maryland. On December 3, 2010, the Board issued amended charges against the Respondent alleging additional misrepresentations that he was authorized to practice engineering in Maryland.

On January 6, 2011, I held a hearing at the Office of Administrative Hearings (OAH), 11101 Gilroy Road, Hunt Valley, Maryland. Md. Code Ann., Bus. Occ. and Prof. §§14-319 and 14-508 (2010); Md. Code Ann., State Gov't § 10-205 (2009). Kris King, Assistant Attorney General, represented the Board. The Respondent was present and represented himself.

Procedure in this case is governed by the provisions of the Administrative Procedure Act, the hearing regulations of the Department of Labor, Licensing and Regulation (DLLR), and the

Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2010); Code of Maryland Regulations (COMAR) 09.01.03 and COMAR 09.23.02; and COMAR 28.02.01.

ISSUES¹

(1) Whether the Respondent misrepresented to the public, by use of a title, including “engineer,” or by use of the term “engineering” in the name of his business activity, by description of services, methods, or procedures, or otherwise, that he was authorized to practice engineering in the State of Maryland under Md. Code Ann., Bus. Occ. and Prof. § 14-502 (2010)?

(2) Whether the Respondent is subject to a civil penalty under Md. Code Ann., Bus. Occ. and Prof. § 14-508(b) (2010)?

SUMMARY OF THE EVIDENCE

Exhibits

The Board submitted the following exhibits, which were admitted into evidence:

Board Ex. #1 - September 29, 2010 Notice of Hearing, with certified mail receipt

Board Ex. #2 - December 3, 2010 Amended Statement of Charges and Order for Hearing

Board Ex. #3 - August 12, 2010 Statement of Charges and Order for Hearing

Board Ex. #4 - December 27, 2010 Certification by Pamela J. Edwards, Assistant Executive Director, Division of Occupational and Professional Licensing, DLLR

Board Ex. #5 - January 5, 2011 Certification by Pamela J. Edwards

Board Ex. #6 - August 25, 2005 Preliminary Plan Application (File No. 20060480) for the Development Review Division, Montgomery County Department of Park and Planning, with December 20, 2010 Certification by Pamela J. Edwards

¹ Although the Board amended its Statement of Charges against the Respondent stating that he is not and never has been licensed by the Board to practice engineering, the Board did not specifically charge him with violating § 14-501 of the Business Occupations and Professions Article of the Maryland Annotated Code (practicing engineering without possessing a license). Accordingly, I will not address that issue herein.

Board Ex. #7 - September 12, 2005 Application for Stormwater Management, Montgomery County Department of Permitting Services, with December 20, 2010 Certification by Pamela J. Edwards

Board Ex. #8 - September 12, 2005 Application for Stormwater Management, Montgomery County Department of Permitting Services (identical to Board Ex. 7), with December 10, 2010 Certification by Kevin Carmody, Permit Technician, Montgomery County Department of Permitting Services

Board Ex. #9 - Respondent's June 20, 2005 Qualifications in Land Planning, Site Planning, Engineering, Landscape Design and Environmental Issues (resume), with January 4, 2011 Certification by Pamela J. Edwards

Board Ex. #10 - Respondent's June 15, 2007 Letter Response to June 5, 2007 Complaint No. 07-PE-19 (with attachments); Respondent's April 15, 2007 Qualifications As a Consultant in Site Planning, Grading, Sediment Control, Storm Water Management, Landscape Design and Environmental Issues, with December 20, 2010 Certification by Pamela J. Edwards

Board Ex. #11 - May 4, 2006 Transcript of Preliminary Plan of Subdivision No. 120060480, Hillmead/Bradley Hills, before the Montgomery County Planning Board, Maryland-National Capital Park and Planning Commission

Board Ex. #12 - February 8, 2007 Complaint No. 07-PE-16, with attachments

Board Ex. #13 - July 28, 2009 Report of Investigation Case Number 07-PE-16, with attachments

Board Ex. #14 - August 3, 2009 Supplement Report of Investigation to Case Number 07-PE-16, Case No. 07-PE-019, with attachments

The Respondent submitted the following exhibits, which were admitted into evidence:

Resp. Ex. #1 - Webster Handy College Dictionary, definitions of engineer, engineering and civil engineering, undated

Resp. Ex. #2 - January 3, 2011 Job Specification Search Results for "engineer" in the State of Maryland

Testimony

The Board presented the testimony of the following witnesses:

1. Harriet Kuhn, Hillmead/Bradley Hills resident
2. Steven Kanstoroom, Complainant

3. Jack Mull, Investigator, Division of Occupational and Professional Licensing, DLLR
4. Pamela J. Edwards, Assistant Executive Director, Division of Occupational and Professional Licensing, DLLR

The Respondent testified on his own behalf and did not present any additional witnesses.

FINDINGS OF FACT

Having considered all of the evidence presented, I find the following facts by a preponderance of the evidence:

1. The Respondent is not, and never has been, licensed as a Professional Engineer (P.E.) nor licensed by the Board to practice engineering with the State of Maryland. Board Ex. #4.
2. The Respondent is not, and never has been, licensed as a Professional Land Surveyor (nor licensed by the Board to engage in land surveying) with the State of Maryland. Board Ex. #5.
3. Sometime in early 1992, the Respondent entered into a contract with Mr. Kanstoroom to provide extensive engineering services in an over \$1.5 million dollar subdivision project. Board Ex. #12. Mr. Kanstoroom was referred to the Respondent by another developer.
4. In meeting with the Respondent, Mr. Kanstoroom believed that he was an engineer, as he represented himself in that manner. The Respondent noted that he had many years experience in engineering and he provided Mr. Kanstroom with a resume purporting to evidence the same (see Board Ex. #9). Based upon these representations, Mr. Kanstoroom hired the Respondent to perform engineering work.

5. Pursuant to the contract, the Respondent invoiced Mr. Kanstoroom for over \$90,000 worth of work, including an hourly rate for the Respondent's engineering work which included tree surveys, road designs, bridge designs, culvert designs, storm water management and flood plain studies. Much of the work was within a forest or wetlands and consisted of steep, rugged terrain.

6. Mr. Kanstoroom was under the belief that in performing all of the above-described engineering work, the Respondent was appropriately licensed to perform such work by the State of Maryland.

7. During the course of the over five-year project, a number of problems surfaced (including, but not limited to, topography and forest conservation easement issues) and, ultimately, Mr. Kanstoroom became unsatisfied with the Respondent's work.

8. Sometime in mid-to-late January 2007, as he began to question the Respondent's work product, Mr. Kanstoroom was contacted by Ms. Kuhns regarding the Hillmead/Bradley Hills community and his experience with flood plain issues. During his conversation with Ms. Kuhns, Mr. Kanstoroom learned that Ms. Kuhns also had dealings with the Respondent and that the Respondent did not have any licensing credentials.

9. After learning from Ms. Kuhns that the Respondent did not have any licensing credentials, Mr. Kanstoroom independently began to investigate the Respondent's licensing status including, but not limited to, contacting the Board via the DLLR, and discovered that Ms. Kuhns was correct and that the Respondent was not, in fact, a licensed engineer. He further discovered that the Respondent had been recently

introduced in a Montgomery County public hearing as a civil engineer in relation to a proposed subdivision in Bethesda, i.e. the Hillmead/Bradley Hills community.

10. As a result of his investigation, on February 8, 2007, Mr. Kanstoroom filed a Complaint Form with the Board, via the DLLR, complaining that: the Respondent misrepresented that he was engineer, both verbally and in writing to him and that he relied on the Respondent's expertise as an engineer in hiring him to perform engineering work, which resulted in numerous engineering-related problems, causing him to suffer a financial loss. Finally, Mr. Kansoroom complained that the Respondent was out in the community testifying before a local governmental entity as an engineer even though he was not licensed to do so. Board Ex. #12.

11. Shortly after Mr. Kanstoroom filed his complaint, assigned Case No. 2007-PE-16, the Board opened a second complaint against the Respondent on or about May 10, 2007, assigned Case No. 07-PE-019 (collectively referred to as the complaints) based upon some of the allegations Mr. Kanstoroom made in Case No. 2007-PE-16.

12. Initially, the Board assigned John Stankowski² to investigate the complaints. Jack Mull assumed all of Mr. Stankowski's cases and re-investigated them. Mr. Mull conducted his own independent investigations in order to file his own reports. Board Ex. #13.

13. As part of his investigation of Case No. 2007-PE-16, Mr. Mull reviewed documentation submitted by the complainant, Mr. Kanstoroom, and interviewed him and the Respondent, with Respondent's legal counsel present. Board Ex. #13.

² Mr. Stankowski left the DLLR sometime in the Spring of 2008.

14. When Mr. Mull asked the Respondent about his resume and testimonial experiences, and whether people he gave his resume to or spoke to, respectively, knew he was not licensed as an engineer, he replied, "I told them if they asked, but I never represented that I was. I wouldn't bring it up, but if asked, I would always inform them that I'm not licensed." Board Ex. #13.

15. On or about July 28, 2009, Mr. Mull completed and delivered to the Board his Report of Investigation in Case No. 2007-PE-16. Board Ex. #13.

16. As part of his investigation of Case No. 2007-PE-19, Mr. Mull again reviewed various documents and submitted written questions to Jared McCarthy, Associate General Counsel, Maryland-National Capital Park and Planning Commission (MNCPP), to be posed to three Planning and Development Review employees (Cathy Conlon, Richard Weaver and Steve Federline). Mr. Mull also interviewed: Ms. Kuhns; Mr. Nelu Schwartz (Professional Engineer No. 11449), who had worked with the Respondent since Mr. Schwartz's retirement in 1995 and on a contract basis thereafter; Richard Brush, Manager of the Water Resources Section, Montgomery County Department of Permitting Services, Division of Land Development Services; Blair Lough, Plan Reviewer in the Water Resources Section, Montgomery County Department of Permitting Services, Division of Land Development Services; and the Respondent with his legal counsel present. Board Ex. #14.

17. Ms. Kuhns is a Washington D.C. public school psychologist and property owner in the Hillmead/Bradley Hills subdivision. She became acquainted with the Respondent via an application he submitted to the Montgomery County government as the engineer

on a project on behalf of another Hillmead/Bradley Hills property owner who wanted to re-subdivide her land into five parcels, i.e. the August 25, 2005 Preliminary Plan Application (File No. 20060480) for the Development Review Division, Montgomery County Department of Park and Planning (Board Ex. #6).

18. Ms. Kuhns did not want the re-subdivision project to proceed for a variety of community-related reasons and, therefore, kept abreast of all applications filed, plans provided and hearings held pertaining to the project. In so doing, she discovered what she believed were some inaccuracies in the forest conservation and flood plain documents prepared and/or filed by the Respondent and; therefore, she began investigating the Respondent's work on the subject project as well as any other work he had performed as a land planner-developer in Montgomery County. As a result of her investigation, she discovered that the Respondent was not a licensed engineer even though he had signed various land planner-development related documents as the "engineer" on the subject project (Board Ex. #7) and was represented in a public hearing that she attended as the "civil engineer" on the project (Board Ex. #11). Ms. Kuhns informed Mr. Mull about each of these circumstances during her interview. Board Ex. #14.

19. On August 3, 2009, Mr. Mull issued a Supplement Report of Investigation to Case Number 07-PE-16, i.e. Case No. 07-PE-019. Board Ex. 14.

20. On August 24, 2009, Mr. Mull issued a second Supplement Report of Investigation to Case Number 07-PE-16, i.e. Case No. 07-PE-019. Board Ex. 14. This report contained the answers received from the submitted written questions to the MNCPP employees. Steve Federline, Environmental Planning Supervisor, and Cathy Conlon, Subdivision Supervisor in the Development Review Division, were unaware that

the Respondent was not a licensed engineer. Ms. Conlon noted that the Respondent did sign a preliminary plan application in the engineer space (Board Ex. #6). MNCPP considers the person signing is, in fact, a licensed engineer yet, she noted that it does not require that the document be sealed nor does the MNCPP check an individual's licensing status.

21. On or about August 25, 2005, the Respondent signed and submitted a certification as the as "Engineer/Surveyor" on a Preliminary Plan Application for the Development Review Division, MNCPP (File No. 20060480) in regard to the Hillmead/Bradley Hills subdivision in Montgomery County, Maryland. Board Ex. #6.

22. On or about September 12, 2005, the Respondent signed and submitted a certification as the engineer on an Application for Stormwater Management for the Montgomery County Department of Permitting Services in regard to the Hillmead/Bradley Hills subdivision. Specifically, in the "Engineer Information" section for the firm name and contact person, the Respondent listed "Sutherland Associates" and "Lee Sutherland." Board Ex. #7.

23. On June 20, 2005, the Respondent was using a resume titled "Qualifications in Land Planning, Site Planning, Engineering, Landscape Design and Environmental Issues." The opening line states that the Respondent is "currently an independent consultant ha[ving] over forty-five (45) years experience in engineering, surveying, land planning, landscape design, land development, inspection, construction supervision, and architecture." The initial page of the resume goes on to expressly state that the Respondent "[f]rom 1960 to 1977, [] rose in position from draftsman, to designer, to engineer to project manager with several major Engineering and Surveying firms in the

Baltimore-Washington Metropolitan Area” and then “[f]rom 1977 until 1994, [he] was Owner, President and Chief Engineer of the Development Consultants Group, Inc.” The remaining page and page two additionally detail a myriad of land, zoning and similar cases that he has testified on as “an expert witness in engineering, site and land planning,” as well as referring many times to his vast amount of experience in the field of engineering as it relates to construction, design, variance, site planning, and other related issues. It also denotes that his work has been “submitted, reviewed and approved by Government agencies.” Pages three through five list over thirty different projects of significant scale in which the Respondent describes his role in these projects as the designer, adapter, planner, preparer, evaluator as well as utilizing the phrase “Project Engineer.”

24. On May 4, 2006, the Respondent presented oral statements to the Montgomery County Planning Board concerning the Preliminary Plan of Subdivision No. 120060480, Hillmead/Bradley Hills, where the attorney who represented the applicant of the preliminary plan introduced the Respondent to the Commissioners of the Board as “our civil engineer and land planner.” In the Respondent’s statements to the Commissioners, he did not correct the representation that he was a civil engineer. Board Ex. #11.

25. On April 15, 2007, the Respondent amended his resume in response to the complaints which are the subject of this hearing for the purpose of deleting the words engineer and engineering. The following items from his June 20, 2005 resume remained. The initial page of the resume states that the Respondent “[f]rom 1960 to 1977, [] rose in position from draftsman, to designer, to project [the word project added] engineer to project manager with several major Engineering and Surveying firms in the Baltimore-

Washington Metropolitan Area” and then “[f]rom 1977 until 1994, [he] was Owner, President and Chief Engineer of the Development Consultants Group, Inc.” The remaining page and page two continue to additionally detail a myriad of land, zoning and the like type cases that he has testified on as “an expert witness,” however, the engineering prefix has been removed, where only “site and land planning” remain; yet, it remains that he has testified as an expert witness on “engineering issues.” Additionally, the content as a whole as to what the Respondent had testified to is the same and it continues to refer many times to his vast amount of experience in the field of engineering as it relates to construction, design, variance, site planning, and related issues. It again denotes that his work has been “submitted, reviewed and approved by Government agencies.” Pages three through five also continue to list over thirty different projects of significant scale in which the Respondent describes his role in these projects as the designer, adapter, planner, preparer and evaluator.

DISCUSSION

§ 14-502. Misrepresentation.

The Respondent is charged with violating Md. Code Ann., Bus. Occ. and Prof. § 14-502 (2010). These provisions state, in pertinent part:

§ 14-502. Misrepresentation.

Unless authorized under this title to practice engineering without the supervision required under § 14-303 of this title, a person may not represent to the public, by use of a title, including “engineer”, “professional engineer”, “licensed engineer”, or “registered engineer”, by use of the term “engineering” in the name of the person’s business activity, by description of services, methods, or procedures, or otherwise, that the person is authorized to practice engineering in this State.

Parties' Positions

The Board

The Board argued that the evidence in this case supports a conclusion that the Respondent is guilty of misrepresenting to the public that he is a licensed engineer in violation of § 14-502. It maintained that the facts are clear and uncontested, as the Respondent admitted, that he signed documents where an engineer's signature was requested and that the Respondent did not correct a public hearing record where he was identified as a civil engineer. Further, the Board noted that Mr. Kanstoroom reasonably believed that the Respondent was an engineer based on conversations he had with him in which he referred to himself in that manner and the fact that he stated the same on his resume, equating to the fact that he was licensed by the State of Maryland to practice engineering. The Board also maintained that the Respondent utilized a resume which listed projects of impressive magnitude purporting to require a P.E. license. Indeed, some of these projects went so far as to list him as the "Chief Engineer." The Board contended that the public has a right to trust in what appear to be genuine documents that they read and make the obvious and natural inference that the Respondent was a P.E. by signing Montgomery County applications as an engineer and stating expressly on his resume that he is an engineer.

Mr. Kanstoroom testified that he specifically was seeking to hire a P.E. since his project necessitated one and discussed the details, plans, and permits needed to perform the project with the Respondent, all of which would require the work of a P.E. When the Respondent agreed to do all of the drawings and obtain all of the permits (as outlined in his itemized invoice), Mr. Kanstoroom said that he had a right to equate those representations to the idea that the Respondent was, in fact, licensed to do the work for which he was hiring the Respondent. Mr.

Kanstoroom testified candidly that he had no reason to think that the Respondent was not a P.E., especially because he never mentioned that he was working with someone else who would have to approve his work or someone else would be signing the permits needed because he was not able to do so. Mr. Kanstoroom first learned that the Respondent was unlicensed when he spoke to Ms. Kunhs about issues she was having with the Respondent related to her community. He testified that his project was ultimately halted due to conflicts in the Respondent's engineering work and related drawings and calculations.

Based on all of the above, the Board argued that the law is clear and unambiguous that "a person may not represent to the public" that he is an "engineer" or use the term "engineering" in the name of the person's business activity or by description of services, methods, or procedures, unless authorized to practice engineering. First, the Board pointed out that the statute specifically prohibits use of the word engineer even without the prefix of "professional," "licensed," or "registered." Second, the statute also specifically prohibits referring to one's professional accomplishments or work to be performed as that of engineering, including one's conversations with the public in hopes of garnering work as an engineer and/or one's resume descriptions purporting to establish work performed as an engineer. By holding himself out to the public as an engineer (whether it be on signed applications, in a public hearing, on a resume or in conversations with prospective clients), the Board claimed that the Respondent knew or should have known that the public was and is relying on his purported expertise. Thus, the Board put forth that a preponderance of the evidence standard is met.

The Respondent

In his Response to Case No. 07-PE-19 that the Respondent submitted to the Board on June 19, 2007, he stated the following as to his background. He is sixty-seven years of age.

Between 1958 and 1961, he served in the military and was assigned to the U.S. Army Corps of Engineers. After attending the Combat Engineers School, he was assigned to Construction Engineer Battalions in California, Virginia and Germany. Between 1964 and 1968, he was a student in the engineering school of Johns Hopkins University; yet, he did not complete the degreed engineering program as he needed to work and support his family. Board Ex. #10.

In terms of his engineering-type work experience, he noted that while still in high school, he worked during the summers of 1956-1958 as a draftsman and surveyor for the firm of Whitman, Requardt & Associates in Baltimore. After discharge from the U.S. Army, he returned to Whitman, Requardt & Associates as a draftsman from 1961 to 1963. Between 1963 and 1968, he worked for the engineering firm of Purdum and Jeschke in Ellicott City; between 1968 and 1972, he worked for the engineering firm of Greenhorne & O'Mara in Riverdale; and between 1972 and 1977, he worked for the engineering firm of Toups & Loiederman in Rockville. In 1977, he formed a consulting firm known as Development Consultants Group and later sold his interest in 1994. Since 1994, he has worked as a Land Development Consultant. Board Ex. #10.

At the hearing, the Respondent claimed that he never professed to be nor held himself out as a "professional," "licensed" or "registered" engineer, because his resume adequately placed the public on notice that he was not a P.E., as it did not contain those initials. Rather, he maintained that his resume would lead someone to believe that he is an engineer consultant. He conceded, however, that he calls himself an engineer and other people have called him an engineer based upon his extensive work experience in that field, which involved typical civil engineering related matters. He explained that he considers himself an engineer because he is "knowledgeable about development." Hence, that is how he represented himself when dealing with Mr. Kanstoroom. Indeed, he may have referred to himself as an engineer when speaking to

Mr. Kanstoroom, but never as a P.E.

In terms of the two documents he signed as the engineer on the project (Preliminary Plan Application for the Development Review Division, Montgomery County Department of Park and Planning, Board Ex. #6, and the Application for Stormwater Management, Montgomery County Department of Permitting Services, Board Ex. #7) (collectively referred to as the documents or the applications), the Respondent conceded that he signed in that capacity but explained that neither of those documents had a space for a P.E. license number nor did they require a seal for certification. The Board did not argue the same but merely contended that signing as the engineer in the space providing for such represented to the local jurisdictions in which the filings were made that the Respondent was, in fact, a P.E. The Respondent countered that the individuals who worked for those local jurisdictions (e.g., Angela Brown with Montgomery County) knew he was not a P.E. and that these two jurisdictions, although they used the word engineer, did not require a licensed engineer's signature. The Respondent, however, failed to call Ms. Brown or any individuals from Montgomery County to substantiate these claims.³

In terms of the May 4, 2006 Preliminary Plan Hearing regarding Subdivision No. 120060480, Hillmead/Bradley Hills, before the Montgomery County Planning Board, MNCCP, the Respondent again admitted that he did not correct the attorney on the project when he was introduced as the civil engineer on the project because one, he did not clearly hear him say that and two, the setting and layout of the hearing made it impossible for him to jump up on the stage to do so.

³ On cross examination, the Respondent stated that he did not subpoena anyone from Montgomery County because the holidays were just prior to his hearing and the offices were closed due to budget cuts; however, the OAH Notice of Hearing was mailed to the Respondent on September 29, 2010, over three months prior to the hearing (Board Ex. #1).

Further, the Respondent contended that section 14-502 is completely overbroad: that the word use of engineer in our society is too all encompassing; that the State of Maryland is unreasonably restricting terms in common usage, per the Webster's Dictionary definition of the same (see Resp. Ex. #1); and that the State of Maryland itself is in violation of the statute by seeking "engineer" job applicants that do not correlate to the engineering field and/or require a P.E. as proscribed by the statute (see Resp. Ex. #2). The Respondent provided no evidentiary support for these legal arguments. He further pointed out that the words "engineer" or "engineering" have never been and are not contained on his business card. To the extent that his resumes have contained the words "engineer" or "engineering", they have been deleted. He steadfastly maintained that he does not believe he is in violation of the law as he did not expressly hold himself out as a P.E., as opposed to an engineer. He explained that he has worked as a consultant in the land development field for many decades and, to his knowledge, his reputation for integrity has only recently been questioned by persons opposed to a project on which he worked (Ms. Kuhns) and that no building has collapsed or individual been aggrieved as a result of his work. He is outraged that his reputable standing has been brought into question at a time when he is close to winding down his land development practice and, therefore, reasoned that the State of Maryland "must really be pressed for funds" if it is pursuing a case against him over semantics.

Analysis

Based on the testimony of the witnesses and the documents admitted into evidence, it is clear to me that the Respondent misrepresented himself as an engineer, in violation of Md. Code Ann., Bus. Occ. & Prof. §14-502. Although he may not have used the title P.E., or referred to himself as a "licensed, registered or professional engineer," the Respondent certainly did not do

anything outwardly to inform people otherwise. Indeed, the Respondent essentially testified that he practiced engineering by omission, meaning, if not asked, he would not tell he was unlicensed. His resume referred to himself as an engineer, it specifically described his engineering work and, upon reading it, would lead a reasonable person to believe that he was a licensed engineer. Furthermore, he testified that he actually considers himself an engineer based upon his vast years of engineering work experience and would refer to himself as such. The problem with that consideration, however, is that the Respondent did not have the right to hold himself out to the public in that manner, as the public should not be expected to affirmatively ask someone who calls himself an engineer an unnecessary follow-up question of, “does that mean you are licensed or have a P.E.?” The public is entitled to assume that if someone calls himself something, he is, in fact, that something.

Mr. Kanstoroom credibly testified that he sought out references from a contractor for an engineer to work on a land development project. The contractor recommended the Respondent. Mr. Kanstoroom recalled discussing with the Respondent his qualifications as an engineer and additionally, the Respondent giving him his resume titled “Qualifications in . . . Engineering” The resume detailed several substantial projects where he listed himself as the Chief Engineer or Project Lead and specifically described the scope of his engineering work and further reflected that he had a vast amount of engineering experience. Although the resume submitted into evidence does not indicate that the Respondent was licensed or a P.E., the Board’s witness’s testimony was unrefuted that he orally represented prior services he rendered as that of an engineer. Furthermore, the services provided beget an understanding that the Respondent was indeed a licensed P.E., inducing Mr. Kanstoroom into believing the Respondent was more qualified than he actually was. Based on his interaction with him and his understanding of the

services to be provided, he honestly believed the Respondent was a licensed engineer. I find that Mr. Kanstoroom had a right to reasonably believe that the Respondent was a licensed P.E. throughout his dealings with him.

The Respondent does not dispute that he signed the subject applications at issue in this case nor does he dispute that he did not correct an attorney's introduction of him as the civil engineer on a project in a public hearing. In fact, these documents were all admitted into evidence as Board Exhibits #6, #7 and #11. He explained several times on the record (but without any witness corroborating support) that these applications did not require the signature of a licensed engineer, even though the signatures lines requested an engineer's signature. He could not understand why after spending his entire career in the engineering field without incident, he was now being cited for violating Maryland law. Yet, the Respondent also testified that he was not a P.E.⁴ Nevertheless, he adamantly disputes that he held himself out as a licensed P.E. when he provided engineering services for Mr. Kanstoroom, signed the subject applications as the engineer on the projects and when he was introduced and present for the Montgomery County public hearing.

As to the Respondent's complaints about section 14-502 that it is overbroad, unduly restrictive and that the State of Maryland is in itself in violation of it, as noted above, the Respondent has failed to provide any evidentiary support or provide any further legal reasoning for his allegations beyond an undated Webster's dictionary definition of the word engineer (Resp. Ex. #1). Without such assistance, I decline to address those complaints beyond what I have already found.

⁴ Pamela J. Edwards, Assistant Executive Director of the Maryland Board for Professional Engineers, confirmed the lack of a P.E. license. (Board Ex. #4).

With that said, however, I note that the substantive language of section 14-502 (formerly Art. 75 1/2) has not changed as it relates to the use of the titles therein, i.e., engineering, or to other representations that a person is authorized to practice engineering, i.e. the person's business activity, by description of services, methods, or procedures. See 1989 Md. Laws, pp. 660-61. This "standard language [has been] used throughout this article to express a prohibition against false representation of authority to practice a regulated profession." Id. Thus, section 14-502 was enacted specifically for cases like the Respondent's. Indeed, the Legislature has enacted likewise misrepresentation prohibitions against the use of similarly "broad" terms in other regulated professions. See, e.g., Md. Code Ann., Bus. Reg. § 9A-504 (2010), entitled "Misrepresentation" pertaining to "the heating, ventilation, air-conditioning and refrigeration services;" Md. Code Ann., Bus. Occ. and Prof. § 2-603 (2010), entitled "Misrepresentation as authorized practitioner" pertaining to, among other titles, "public accountant" and "auditor;" Md. Code Ann., Bus. Occ. and Prof. § 3-603 (2010), entitled "Misrepresentation as authorized practitioner" pertaining to, among other titles, "architect;" and Md. Code Ann., Bus. Occ. and Prof. § 10-602 (2010), entitled "Misrepresentation as authorized practitioner" pertaining to, among other titles, "lawyer" and "counselor at law." Accordingly, without more from the Respondent, I find that section 14-502 is not overbroad or unduly restrictive.

In terms of the State advertising jobs for engineers that were not required licensed positions, the Respondent simply printed a list of job openings, without the qualifications and/or credentials necessary to obtain those positions. See Resp. Ex. #2. Additionally, there are a variety of exceptions under Maryland law pertaining to the ability to practice engineering and/or use the title engineer without state licensing requirements (see, e.g., Md. Code Ann., Bus. Occ. and Prof. §§ 14-301 *et. seq.*) and, from the exhibit the Respondent produced, there is no way of

knowing if any or all of these are exempted categories and, even if some were not, it has no relevancy as to the issue of whether the Respondent, not the State, violated section 14-502.

In sum, based upon all of the above, I conclude that the Respondent violated Md. Code Ann., Bus. Occ. & Prof., § 14-502, as the facts and documents contained in evidence resoundingly support the violation.

Regulatory Penalties

In addition to allowing for criminal penalties, the Business Occupation and Professions Article allows the Board to impose a financial penalty not exceeding \$5,000.00 for each statutory violation. In determining the appropriate penalty, I am directed to consider the following: 1) the seriousness of the violation; 2) the harm caused by the violation, 3) the Respondent's good faith; 4) the history of previous violations by the Respondent; and 5) any other relevant factors. Md. Ann. Code, Bus. Occ. & Prof., § 14-508(b)(2010).

The Board argued that the Respondent committed at least five violations: on two applications, he signed documents listing himself as the engineer on the project; he did not correct a public hearing record where he was identified as the civil engineer; he purported to Mr. Kanstoroom that he was a licensed engineer by expressly referring to himself as an engineer; and, he utilized a resume listing himself as not only qualified as an engineer but also describing him as an expert in engineering. The Board stated that through these five violations, it was entitled to seek a fine of \$5,000.00 for each violation for a total of \$25,000.00; however, it was reducing this amount by one-fifth of the total and was electing to seek a fine of \$1,000.00 for each violation, for a total of \$5,000.00.

I find the violations outlined above clearly warrant the imposition of a civil penalty. In determining the amount of that penalty and taking into consideration the positions the parties

posited (laid out above), I find the following as to each of the outlined elements in section 14-508(b).

As to the seriousness of the misrepresentations, clearly, the public has a right to trust in what appear to be genuine documents that they read and make the obvious and natural inferences from them. One naturally assumes that if an individual refers to himself in a certain capacity, that he is actually authorized to speak and work in that capacity; there would be no reason to assume otherwise. Here, I find that a person was/is entitled to presume that the Respondent was licensed because he signed applications as an engineer, stated expressly on his resume that he is an engineer, spoke to a potential client about his prior engineering work and the ability to perform engineering work as he was an engineer, and did not bother to correct a misstatement about his engineering status in a public forum—and, that those actions, in and of themselves, are serious.

The harm perpetuated by these misrepresentations can be staggering. People reading a resume purporting to equate to something that turns out to be untrue can rely on these representations to their detriment. Indeed, Mr. Kanstoroom emphatically stated that he would not have hired the Respondent to perform engineering work if he knew he was not licensed. Further, as a result of hiring an unlicensed engineer, his \$1.5 million dollar project has been halted because of numerous engineering-related errors that the Respondent made.⁵ However, with respect to the applications he signed, the Respondent testified that they were only preliminary and that a P.E. would have signed and sealed any additional approvals. This was un rebutted. As to the public hearing, the Respondent said that he did not hear the attorney state

⁵ Although Mr. Kanstoroom alleged deficiencies in the Respondent's work product, those deficiencies were not fleshed out at the hearing and, therefore, I will not draw that conclusion in making my calculations.

he was an engineer, but yet he also stated that it was impossible to correct the speaker because of where he was seated in the hearing room. The Board did not specifically discuss the potential harm herein other than to say that because of these three violations, people believed and/or relied upon the statement and signatures.

There is no showing of good faith by the Respondent. The Respondent's conduct throughout the hearing led me to believe that he feels that he is being unjustly condemned. The Respondent testified that he never stated to anyone that he was, in fact, a licensed engineer or a P.E., only that he was an engineer. He fails to understand that holding himself out as an engineer is what is at issue in this case, not whether he held himself out as a licensed P.E. His policy of don't ask, don't tell, is absurd. One can certainly misrepresent by omission, which is exactly what the Respondent did here with Mr. Kanstoroom, in the public hearing, on the applications and on his resume. The Respondent's resume is one of deception, i.e., it is titled "Qualifications . . . in Engineering . . ." He acknowledged no fault or wrongdoing; rather, the Respondent complained that these complaints have forced him out of business. He also flippantly remarked that the State must really be pressed for funds if it is going after someone like him. What he failed to realize is that someone like him is precisely what this statute was designed to address – ensuring that those who represent that they are engineers are, in fact, licensed engineers who possess the educational and testing qualifications to entitle them to to say they are engineers. Respondent has always known this; he attended three years of engineering school, which he did not complete.

The Respondent has no history of violations, but I do find the Respondent's deceptive acts and omissions to be quite serious. The Respondent knowingly and falsely held himself out as an engineer and the public had every right to equate that representation to a licensed

engineer—the statute expressly states as much. The licensing of engineers is important because of the significant role engineering plays in society, affecting every human being in terms of safe buildings and roads, clean water, functional machinery, communication and medicine. The profession is regulated by a licensing board in order to protect the public safety, health, property and welfare. As a result, engineers must be licensed to offer their services to the public.

In my view, misrepresentation by omission is one of the most important determinants in assessing a proper penalty under Md. Code Ann., Bus. Occ. and Prof. § 14-508. With this consideration, the Respondent's violations can be reasonably characterized as being serious. The statute permits a penalty of up to \$5,000.00 for each violation of the prohibitions set forth in section 14-502. The Board has suggested that I recommend a total civil penalty of \$5,000.00.

Considering the Respondent's bad faith, I believe that \$5,000.00 is an insufficient penalty in this case. The Professional Engineers Title of the Business Occupations and Professions Article was enacted to protect the public and to demonstrate to the public that only competent individuals are licensed to work in the engineering field. It provides for an examination and a qualification process for those applicants who aspire to work in the field to insure that licensed individuals are, in fact, competent to provide engineering services to the public. Working without a license is serious in and of itself, but more so, because the Respondent has been working without a license, as he admitted, for nearly fifty years, in violation of established law. Furthermore, the Respondent failed to exhibit any good faith in that he failed to mention to Mr. Kanstoroom that he was not, in fact, licensed to perform engineering work. The conduct engaged in by the Respondent by making these misrepresentations to clients and potential clients through his resume harms the business of engineering in general and adversely affects public perceptions.

As to the misrepresentations on the two applications and in the public hearing, I find that the Board was more than fair in assessing a \$1,000.00 penalty for each of the three violations for a total of \$3,000.00. However, as to the other two misrepresentations via the Respondent's public resume and his dealings with Mr. Kanstoroom, I find that a higher fine is warranted and I recommend a \$2,000.00 penalty for each violation for a total of \$4,000.00. After weighing the evidence presented and considering the parties' positions, I recommend that a total of \$7,000.00 in civil penalties is warranted and appropriate.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Respondent misrepresented to the public by use of a title, including "engineer," and by use of the term "engineering" in the name of his business activity, by description of his services, methods, procedures, and otherwise, that he was authorized to practice engineering in the State of Maryland, in violation of Md. Code Ann., Bus. Occ. & Prof. § 14-502 (2010). I further conclude as a matter of law that the Respondent is subject to civil penalties in the amount of \$7,000.00 under Md. Code Ann., Bus. Occ. and Prof. § 14-508(b) (2010).

RECOMMENDED ORDER

I RECOMMEND that the Board for Professional Engineers:


ORDER that the Respondent violated Md. Code Ann., Bus. Occ. and Prof. § 14-502 (2010); and be it further

ORDERED that the Respondent be fined \$7,000.00 for the violations of Md. Code Ann., Bus. Occ. and Prof. § 14-502 (2010), and that the Respondent pay the amount of this fine to the Board for Professional Engineers within thirty (30) days of the adoption of this Recommended

Order by the Commission, Md. Code Ann., Bus. Occ. and Prof. § 14-508(b)(3) (2010); and be it further

ORDERED that the records and publications of the Board for Professional Engineers reflect this Decision.

March 29, 2011
Date Decision Mailed



Nicole Pastore Klein
Administrative Law Judge

NPK
#120143

NOTICE OF RIGHT TO FILE EXCEPTIONS

A party adversely affected by this Proposed Decision has the right to file exceptions to and to request the opportunity to present argument to the Board for Professional Engineers, within twenty (20) days from the postmark date of this decision. The Office of Administrative Hearing is not a party to any review process. Md. Code Ann., State Gov't § 10-216 (2009); COMAR 09.01.03.09.